IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

SPECIAL CIVIL APPLICATION No 514 of 1991

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

AHMEDABAD MUNICIPAL CORPORATION
VERSUS
SHAILESHKUMAR M SHAH

Appearance:
MR AMIT J SHAH for the Petitioner
MR KS ACHARYA for the Respondent

CORAM : MR JUSTICE S.K. KESHOTE
Date of Decision : 15/10/1999

C.A.V. JUDGMENT

1. Ahmedabad Municipal Corporation by this petition under Article 227 of the Constitution has sought to

challenge the award of the Presiding Officer, Labour Court at Ahmedabad in Reference (LCA) NO. 798/90 dated 28th September, 1990 under which the petitioner was directed to reinstate the respondent-workman on his original post with full backwages.

2. The facts of the case, in brief, are that the respondent-workman served the petitioner in the year 1976 for a period of 172 days and in the year 1977 for 9 days on daily wages. Thereafter he stopped coming to duty as daily wager on his own. It appears that on instigation of somebody he approached the Labour Department after a long period of 7 years after he left the services of the Corporation. He filed a complaint before the Assistant Labour Commissioner, Ahmedabad in 1984 for his reinstatement and backwages. That complaint of the respondent-workman was replied by the petitioner on 12th June, 1984. The Assistant Labour Commissioner submitted the failure report and on that report the State Government made reference of industrial dispute for adjudication to the Labour Court, Ahmedabad where it was registered as Reference (LCA) No. 1098/84 which was subsequently renumbered as Reference (LCA) No. 798 of 1990. The respondent-workman filed his claim in the Labour Court on 3-9-1984. The petitioner-Corporation on 11-12-1986 filed its written statement to the claim of the respondent-workman. On 10-11-1987, the statement of respondent-workman (at Ex.7) was recorded. He has not produced any other witness in support of his case. The respondent-workman closed his evidence on 1-12-1987. On 1-2-1989, advocate of the petitioner gave an application to call the witnesses. The matter was kept for evidence of the petitioner on 2-3-1989 and then adjourned to 25-4-1989. On 25-4-1989, no officer on behalf of the petitioner could remained present for evidence and the respondent's advocate gave an application to the Labour court praying therein for closing of the petitioner's evidence which application was granted by the Labour court. The Reference was ultimately decided on 28-9-1990. Hence, this special civil application before this court.

3. On the record of the special civil application, I do not find the reply affidavit of the respondent. However, the petitioner has supplemented his pleadings by filing an affidavit of Dahyabhai J Patel and the respondent has filed reply to this affidavit.

4. The special civil application was placed on Board before this court for preliminary hearing on 30th January, 1991, on which date, the petition was admitted

and in the facts of the case by way of interim relief, the Court has directed that there shall be no interim relief against the order of reinstatement. However, as far as the payment of back wages is concerned, the court ordered that the petitioner-Corporation will be at liberty to withhold 50% of the amount of backwages. The court has further ordered that in the facts of this case it do not propose to impose any condition on the petitioner -Corporation while permitting it to withhold the amount of backwages. However, the court has directed that the amount of 50% of backwages shall be paid to the respondent-workman latest by February 28, 1991.

5. The petitioner- Corporation instead of contesting the interim order which has been passed by this court on 30th January, 1991 has chosen to file petition for special leave to appeal before the Hon'ble Supreme Court of India. On 12th July, 1991, the Hon'ble Supreme Court of India in that application issued notice to the respondent-workman, and further directed that in the meantime, the amount of 50% should be deposited by the petitioner but may not be permitted to be withdrawn till further orders. The amount was ordered to be deposited in the High Court within four weeks. That petition for special leave to appeal was dismissed on 7-9-1995.

6. The respondent-workman was reinstated in service as Motor Mazdoor and the amount of 50% of backwages has also been deposited by the petitioner in the court. The respondent -workman filed Misc. Civil Application No. 551/91 with the complaint that the petitioner reinstated him as Motor Mazdoor instead of Attendant Clerk. This M.C.A. was decided by this court on 27-11-1991 and the same was rejected. This court has held that the respondent- workman has not produced on the record any material to show that he was appointed as Assistant Attendant or Attendant Clerk.

7. In this petition, the petitioner filed an affidavit dated 8th July, 1999 and the facts which are stated therein are necessary to be mentioned in this judgment. 50% of backwages was deposited by the petitioner in the court on 5-8-1991. The petitioner issued an order dated 4-2-1991 Refuse EST No.47 and letter dated 8-2-1991 directing the respondent- workman to present himself on the post of Motor Labourer within three days. On 20-2-1991, the respondent-workman presented himself for duty. Thereafter on 22-2-1991 and 5-4-1991, the respondent-workman wrote letters and

complained therein that it is wrong to take work of Motor Labourer from him as his post was not of Motor Labourer but Attendant Clerk and thereafter from 1-7-1991, the respondent -workman stopped coming to work as Motor Labourer on his own. The respondent wrote a letter dated 15-10-1991 and informed the petitioner that from 1-7-1991 to 15-7-1991 he was on sick leave and he was also ill at that time and thereafter he was not able to remain present on duty. The respondent used to write the letters to the petitioner that he will do the work of Attendant Clerk and not that of Motor Labourer. The Deputy Municipal Commissioner, Administration called the respondent-workman in person on 3-3-1992 with the evidence of his appointment as Attendant Clerk. On 3-3-1992 the Dy. Municipal Commissioner heard him personally but the workman - respondent could not satisfactorily reply about his qualifications nor he has produced school leaving certificate, appointment letter as Attendant Clerk, and letter of interview for the post of Attendant Clerk. He also failed to produce a zerox copy of the certificate dated 5-3-1982 alleged to have been issued by Refuse Removal Supervisor. On inquiry, the Dy. Municipal Commissioner found this certificate to be fake one. Later on the respondent-workman on 4-3-1992 wrote a letter to the petitioner and alleged therein that his statements were recorded with ulterior motive without the respondent's knowledge and under the pressure, and the same are not binding upon him. On 7-4-1992, the petitioner gave notice to the respondent to present himself on duty within three days. Pursuant to the said notice on 21-4-1992, the respondent replied reiterating his demand to appoint him as Attendant Clerk and did not present himself on duty. Thereafter, several notices were given by the petitioner to the respondent to present himself on duty but the respondent reiterated his demand to appoint him as Attendant Clerk and did not present himself on duty. The petitioner on 6-5-1996 gave notice to the respondent-workman to present himself on duty otherwise departmental proceedings shall be initiated against him. Despite of this notice, he did not remained present on duty. The petitioner issued chargesheet No.70 dated 1-8-1996 to the respondent for not remaining present on duty from 1-7-1991 till date of chargesheet by showing various unreasonable causes and without any justifiable reasons. This chargesheet could not be served upon the respondent by ordinary process. The same was published in the Gujarat Samachar dated 22-2-1997 asking the respondentworkman to remain present before the Inquiry Officer on 10-3-1997 at 12 noon but he did not remain present before the Inquiry Officer on the said date.

The Inquiry Officer proceeded with the inquiry and submitted the inquiry report on 20th March, 1997. It was found by the Inquiry Officer that the respondentworkman remained wilfully absent from duty. Looking to the gravity of the misconduct, the competent authority has taken the decision to remove him from services and a second show cause notice has been given to him as to why he should not be removed from the services. However, the notice sent at the address given by the respondent returned with the postal endorsement, `not found'. So the decision has been taken by the petitioner to remove the respondent from the services.

8. This affidavit has been replied by the respondent but he is unable to show or prove that he was appointed on daily wages as Attendant Clerk.

9. Learned counsel for the petitioner contended that the Labour Court has committed serious illegality in passing of the award of reinstatement of the respondent -workman with full backwages. The respondent -workman was not interested in the job. He elsewhere settled in the gainful employment which is clearly borne out from the fact that he raised industrial dispute after about seven years. It has next been contended that otherwise also it is a case where the respondent-workman abandoned his services and no award of reinstatement could have been passed. Carrying this contention further, learned counsel for the petitioner submits that otherwise also the respondent has worked only for 172 days in 1976 and for 9 days in 1977. He has not completed 240 days services in 12 calendar months preceding the date of his alleged termination. Lastly in his submission even otherwise in this case, the termination of the services of the respondentworkman cannot be said to be in any manner arbitrary or illegal. The petitioner need not to comply with the provisions of section 25-F of the Industrial Disputes Act, 1947. Lastly, it is contended that the respondent-workman has already been removed from the services for a misconduct and this petition may be allowed.

10. Shri Acharya, learned counsel for the respondent, on the other hand, contended that it is a case where the petitioner has not contested the claim of the respondent-workman before the Labour court. In the absence of any material produced before the Labour court, whatever statement made by the respondent-workman has to be accepted and what it has been accepted. It has next been contended that it is a case where even the services of the respondent-workman have been terminated

by an oral order without holding any inquiry or giving any notice. The respondent-workman was working for last five years and he has worked for 240 days per year and his termination could have been ordered only after complying with the provisions of section 25-F of the Industrial Disputes Act, 1947. Lastly, it is contended that the removal of the respondent-workman from the services during the pendency of this special civil application is hardly of any substance.

11. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

12. Learned counsel for the respondent has not disputed (i) that the respondent-workman was only a daily wager, (ii) that he has raised the dispute after seven years of alleged termination of his services, (iii) that he was reinstated back in service but after working for few days he discontinued to attend his duties, (iv) he was given a notice to join the duty but he did not joined. This was taken to be a serious misconduct and after giving the chargesheet he was removed from the services and (v) in the inquiry he has not participated.

13. I do not find any merits in the first contention of the learned counsel for the petitioner that merely because the respondent-workman has raised the industrial dispute after about seven years of his alleged termination from services, the labour court could not have passed any award in his favour. The Labour court is right in its approach that for raising of an industrial dispute, limitation is not prescribed. The provisions of Industrial Disputes Act, 1947 are not subject to the provisions of Limitation ACt, 1963. Delay and laches in raising of an industrial dispute may have affect for relief to be granted but only on this plea the reference cannot be rejected. Moreover, the plea taken by the Management of delay in raising the industrial dispute itself is not sufficient for nonsuiting the workman in the matter. The Management can nonsuit the workman on this ground only if it is proved of real prejudice to it for this delay in raising the industrial dispute. That is not the case here. However, this delay in raising of the industrial dispute is a relevant consideration for the purpose of granting the relief. This delay of 7 years in raising of the industrial dispute has caused any prejudice to the petitioner has not been established as a fact. So only on this ground of delay in raising of the industrial dispute this award cannot be set aside.

14. This delay of seven years in raising of the industrial dispute by the respondent-workman goes to show that he was not in need of the employment. A necessary inference can be drawn from this delay unless contrary is proved by the workman concerned, that he was elsewhere in gainful employment and only at the instance of some other person he would have thought of raising of this industrial dispute. Looking to the nature of employment, that is, daily wage if he would not have been elsewhere in gainful employment, the workman could not have afforded to pay fees to raise an industrial dispute. In this matter one side and sympathetic approach cannot be taken. There are cases after cases where this class of workmen are raising industrial dispute for getting the benefits though they are elsewhere in gainful employment. It is very difficult for the management to prove that this workman was in gainful employment elsewhere and where if the Labour Court finds that the termination is made in violation of section 25-F of the Industrial Disputes Act, he can be given the benefits of backwages also. If we go by the subsequent conduct of the respondent-workman, after decision of the Labour court under the impugned award, it also goes to show that he was not interested in the services. I do not find any positive finding of the Labour court where it has held that the respondent-workman was appointed as a Attendant or Attendant Clerk. It is a daily wage appointment and in the absence of this finding and otherwise any material on the record of this special civil application from the side of the respondent, it is difficult to accept that he was taken on daily wages as Attendant or Attendant Clerk. The Division Bench of this Court in M.C.A. NO.551/91 had an occasion to deal with this aspect and after considering all the aspects it has observed that there is nothing on the record which suggests that the petitioner (the respondent herein) was appointed as Attendant or Attendant Clerk. The grievance of the respondent-workman made in the M.C.A. that he should have been reinstated back as Attendant Clerk was not accepted and his reinstatement as Motor Labourer was not taken to be a contempt of the award. The chargesheet has been given and ultimately the petitioner has removed him from the services.

15. The order of the petitioner to remove the respondent-workman from the services on proved misconduct has not been challenged by him either before this court or before the Labour court by raising an industrial dispute. On being asked by the court, Shri

Acharya has not come up with such a case that this order of removal of the respondent-workman from the services has been questioned by him before appropriate legal forum. In this special civil application also, the respondent has not questioned the validity of this order, meaning thereby, the respondent has accepted this order of removal of his from the services passed by the petitioner. Though only on the basis of this now nothing substantial survives in this special civil application, as the award has been passed not only for reinstatement but with full backwages, this matter has to be decided on merits otherwise if the petition is dismissed only on this ground, the petitioner has to be burdened with the liability of the backwages. The amount of 50% backwages is lying deposited with this court and the amount of 50% backwages has been received by the respondent-workman.

16. It is unfortunate that the Corporation is not taking care, caution and precaution to effectively contest such matters before the Labour court for the reasons best known to it. But only after the awards are passed it awakens and raises all sorts of objections before this court while challenging the same. It is a writ of certiorari and the matter has to be decided on the basis of material produced and the evidence recorded thereto. The petitioner has to make out a case of error apparent on the face of the award but when the matter has not been contested before the Labour court how it could have pointed out any error in the award. Though the petitioner has come up with a case that the respondent-workman has worked only for 170 days in 1976 and for 9 days in 1977 but no evidence has been produced to that effect and naturally in the absence of the evidence from the petitioner, the Labour court has not committed any error in accepting the case of the workman. But this court cannot be oblivious of the facts that the workman was only a daily wager, he raised industrial dispute after seven years of his alleged termination, and that the daily wagers have no right to hold the post, whether it can be said to be a fit case wherein only on the violation of section 25-F of the Industrial Disputes Act the award of reinstatement should have been passed with the continuity of the services and full backwages. The daily wager has no right and the employer has all the right to dispense with his services but where he has completed 240 days services in 12 calendar months preceding the date of termination then the provisions of section 25-F of the Industrial Disputes Act, are to be complied with. In case only on noncompliance of these provisions, the

reinstatement has been ordered and it results in taking of the workman in regular employment then it will become third mode of recruitment to the services of the Corporation contrary to what it is provided in the recruitment rules.

17. It is a case where this daily wage employment will become a conduit pipe for regular appointment by judicial process merely because while terminating the services of a daily wage employee the Corporation has not complied wit the provisions of section 25-F of the Industrial Disputes ACt. The penalty for it is understandable to be given and reasonable compensation may be awarded to the workman but not an award of reinstatement with full backwages. Even if reinstatement is ordered, the employer is within its competence to dispense with the services of a daily wagers as he has no right to the post so long as his services are not regularised in accordance with the recruitment rules. In this case in the absence of any evidence from the side of the Corporation, the finding of Labour court has to be accepted that the respondent-workman has worked for more than 240 days in 12 calendar months preceding the date of his termination and his termination should be taken to be contrary to the provisions of section 25-F of the Industrial Disputes Act but in the facts of this case, the award of reinstatement of the respondent-workman with full backwages is wholly unjustified. He is not interested in service which is clearly borne out from the fact of raising industrial dispute after seven years and from the subsequent facts which have taken place after award and during the pendency of this special civil application. In case he would have been interested in the service, this long delay of seven years would not have been taken by him to raise the industrial dispute. After the award made in his favour by the Labour court and this court has not stayed the same to the extent it relates to the reinstatement, he was given the reinstatement in services but he voluntarily had not continued with the services on the pretext that he was appointed as Attendant Clerk and not as a Motor Labourer. This conduct of the respondent- workman goes to show that he would have been in gainful employment otherwise pending this special civil application he would have joined on the post which is offered to him with all exceptions and objections. The respondent-workman was not in need of the employment otherwise he could not have afforded to do all these things.

18. Then comes the last fact which has taken place

during the pendency of the special civil application i.e. the order of his removal from the services which he himself called for. He exposed himself to these disciplinary proceedings and rightly the Corporation has proceeded in the matter and taking it to be a serious matter he was ordered to be removed from the services. The delay in raising of the industrial dispute itself is not sufficient to deny the reinstatement to the petitioner but cumulative effect of all the facts coupled with this fact certainly justifies the court to decline to grant reinstatement with full backwages even in a case where the retrenchment of the workman is found to be in violation of the provisions of section 25-F of the Industrial Disputes Act, 1947.

19. In the result, this special civil application succeeds in part and the award of the Labour court to the extent where it orders for reinstatement with full backwages of the respondent-workman is quashed and set aside. Instead of reinstatement with full backwages, the respondent workman shall be entitled for Rs.5000/or 50% of backwages, if it has been paid to him, whichever is less in lieu of reinstatement and backwages. Rule is made absolute in the aforesaid terms with no order as to costs. The amount which has been deposited by the petitioner in this case in pursuance to the order of the Hon'ble Supreme Court be refunded to it forthwith.

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